'Bugging' Decision Rests on Adversary Trial Principle

By John P. Mackenzie
Washington Post Staff Writer

Some time-honored principles of American law underlay the Supreme Court "bugging" decision that stirred cries of anguish at the Justice Department last week.

The Court adhered to these principles despite pleas by the Government that some of them did not apply to Cold War diplomacy or the dangerous fight against organized crime. It held that the fruits of illegal electronic eavesdropping, like the product of any other illegal search, must be made available to the bugging victim when he is on trial for a crime.

Alarmed at the ruling's potential for exposing both legal and illegal methods of intelligence-gathering, Government lawyers turned quickly to drafting, and redrafting, a strongly worded petition to the Court to reconsider its 5-to-3 decision.

But the petition, a rare action by the Federal Government in the Court's history, will be running into the Court's own strong reaffirmation of at least two basic tenets of the law.

One is that in American courts, great faith is placed in the adversary process—the clash of more or less equally epuipped lawyers on both sides—to bring out the truth.

Another tenet is that when the Government takes an accused to court on a criminal charge, it must not be allowed to profit, directly or indirectly, for its own illegal conduct.

Ordinarily these principles are not disputed by conservatives or liberals, by critics or admirers of the criminal law decisions of the Warren Court. Judges, no matter how brilliant or well-intentioned, are not expected to do the work of contesting lawyers and decide what evidence would be useful to either side. The prosecution has long been forbidden to introduce not only evidence directly obtained from an illegal search, but also evidence obtained through "leads" developed by such a search.

The question before the high court was not whether wiretapping, even wiretapping of foreign embassies, was legal or moral, but rather, assuming that the eavesdropping was illegal, whether the adversary system of the aid of the illegal conduct.

Solicitor General Erwin N. Griswold argued that if the electronically gathered information is known to be illegally obtained, it should be turned over to Federal trial judges and not directly to the accused. The judges, he said, could screen the material and decide what would be "arguably relevant" to the defense.

Washington lawyer Edward Bennett Williams, arguing against Griswold in two cases involving espionage and underworld extortion, insisted that there was no substitute for the adversary system.

In his brief and in oral argument Williams gave the Justices examples from recent bugging cases of how the trial judge could overlook apparently insignificant statements in an eavesdropping log or tape which, if known to the defense, would help it to show that the prosecution's case had been tainted by information obtained illegitimately.

He showed how prosecutors, acting in good faith, could inform judges that all their evidence was gathered independently of any eavesdropping—without realizing that Federal investigators had been led to certain information by an electronic, rather than a human, informant.

His brief developed the now widely understood fact that FBI intelligence memoranda and reports to Government prosecutors frequently contained a mixture of legally and illegally obtained information, with no warning to the prosecutor which was which.

Bugging Was Common

As a result, the case of nearly every hoodlum worth the Government's attention was a potential target of electronic surveillance before President Johnson cracked down on the practice in 1965, and if he was brought to trial his case file was probably full of bugs. Despite this, out of about 40 cases of admitted illegal bugging or tapping during the past two years, no trial judge has found the Government's case tainted by the illegal conduct.

That may change if, as expected, two dozen other defendants whose cases are on the Court's docket also win a chance for a full adversary hearing on the impact of conceded illegal tapping or planted microphones.

Future cases are less wor-

THE WASHINGTON POST Monday, March 17, 1969 A3

risome to the Government since the 1968 Crime Control Act makes court-authorized eavesdropping legal and thus not subject to the full disclosure ordered by the Court last Monday.

Two Votes Needed

In order to turn the Court around, the Justice Department must get the votes of two Justices who made up the five-man majority, an unusually heavy burden.

Under the Court's rules, Williams will not be allowed to reply to the rehearing petition unless asked by the Court, but the Justices will not call for reconsideration without giving Williams a chance to reply. Lawyers at Williams' firm would not comment when asked whether they, too, might seek a rehearing because of a point they lost in the case.

Justice White's majority opinion agreed with Williams that the disclosure was available to defendants whose own conversations or premises were bugged or tapped illegally. But the Court refused to extend the same benefit to a defendant who was merely the target of the surveillance but not its direct victim.

Even if Williams should join in the plea for a rehearing, the Government must persuade the Court that it overlooked something in its first ruling.

But the dissenting opinions of Justice John M. Harlan and former presidential intimate Justice Abe Fortas, together with Justice White's service as right-hand man to the late Attorney General Robert F. Kennedy, all point to the strong possibility that the Court was fully aware of the extent of Government bugging, national security or otherwise, and the importance attached to it by the executive branch.